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In the Supreme Court of the United States

October Term, 1984

FRANK L. JOHNS,
Petitioner,

vs.

THE SUPREME COURT OF OHIO,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Sixth Circuit Court of Appeals

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QUESTIONS PRESENTED

The issues presented to this Court for determination are most intimately tied to and involved in the administration of justice at the highest level of a state judicial system.

(1) Did the Sixth Circuit Court of Appeals properly affirm the dismissal by a District Court in an action against a State Supreme Court which grounded jurisdiction upon the denial by the State Court of both due process of law and equal protection of the law, when the Complaint charges such denial in numerous specific instances and alleges that the acts, conduct, and decision of the State Court

(a) was the result of bias and

prejudice against the specific language of legislation adopted by the State legislature for the benefit of Petitioner;

(b) was the result of a State Court's determination to rewrite completely the legislation enacted for the benefit of the Petitioner, by the addition of language and the introduction into the legislation of an entirely new and different element, for the specific purpose of depriving the Petitioner of the benefits accorded to him by the legislature;

(c) refused to apply or even to discuss the several

issues of law raised and argued throughout eight years of litigation in the State Court system, but instead

(d) pretended to decide questions of law having no slightest connection with the issues in fact involved and thus committed a fraud, not only upon the Petitioner, but upon the bench and the bar of the State;

(e) having rewritten the legislation, denied finally and completely the right of Petitioner to any benefits from the State for the alleged ground that, upon trial, Petitioner

failed to present evidence with respect to the new element introduced by the Defendant Court, the existence of which in several years of litigation was unknown and never claimed;

(f) by reason of its own expressed determination was guilty of inflicting a deliberate wrongful act against the Petitioner, which is defined elsewhere in the precise language of the Defendant Court as legal malice.

(2) Did the Sixth Circuit Court of Appeals properly affirm the dismissal by a District Court of a Complaint upon the ground that jurisdiction of a federal

court in the cause was barred by the Eleventh Amendment to the United States Constitution when

(a) jurisdiction in the Complaint is grounded upon denial of constitutional rights, specifically due process and equal protection;

(b) the Petitioner sought to remedy that denial by an order directed to the Defendant Court to determine the issues before it solely in accordance with established applicable principles of Ohio law, including the statute enacted by the General Assembly of Ohio constituting the

ting the basis of the litigation before it; and complying, as it must, with all the requirements of due process of law and equal protection of the law.

(c) the law of Ohio announced by the Defendant Court itself declares that any action such as the instant case is not to be considered an action against the State because, in the words of the Defendant Court: "IF IT WERE OTHERWISE, IT WOULD MEAN THAT ONE COULD NOT MANDAMUS A STATE OFFICER TO PERFORM A CLEARLY MANDATORY DUTY, OR ONE COULD NOT ENJOIN HIM FROM COMMITTING PATENT AND OUTRAGEOUS ILLEGAL ACTION. A PRIVATE CITIZEN IN SUCH CASE WOULD BE

HELPLESS FROM UNLAWFUL, OPPRESSIVE, AND OUTRAGEOUS CONDUCT OF A STATE OFFICIAL."

(d) the issue as to whether the present action is an action against the state of Ohio is a question of state law; and when the law of the State clearly declares that it is not an action against the State; and when there is no other proper ground for dismissal and the federal courts constitute the only authority available to require the Defendant Court to make available to the Petitioner both due process and equal protection.

TABLE OF CONTENTS

Questions Presented..... i

Table of Contents.....viii

Table of Authorities..... ix

Jurisdictional Statement..... 2

Constitutional, Statutory, and Rule Provisions Involved..... 3

Opinions of the Lower Courts..... 4

Statement of the Case..... 6

Reasons for Granting the Writ..... 18

Conclusion..... 31

Appendix

A. Opinion of 6th Circuit Court.... A1

B. Judgment of 6th Circuit Court... A11

C. Opinion of District Court..... A13

D. Judgment of District Court..... A24

E. Important Excerpts from Petitioners Complaint..... A26

TABLE OF AUTHORITIES

American Life & Accident Insurance Co. vs. Jones, 152 O.St. 287, 288.....VI, 19

Davis vs. Passman (1979) 99 S.Ct. 2264, 2277.....24

Lassiter vs. Dept. of Social Services (1981) 101 S.Ct., 2153, 2163.....31

Miller, C., Chevrolet vs. Willoughby Hills (1974) 38 O.St.2d, 298, 301.....29

Pack vs. City of Cleveland, 1982, 1 O.S., 3d, 129.....24

Rogers vs. Alabama (1904) 192 U.S.226, 24 S.Ct., 257.....24

Slater vs. Motorists Mutual Insurance Co. (1962) 174 O.St. 148.....30

State ex rel vs. Dept. of Transportation, 8 O.A. 3d, 44.....19

Yazoo County Industrial Development Co. vs. Suthoff, 1982, 102 S.Ct.....27

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S.Const., Amendment XIV.....3

Amended Substitute Senate Bill No. 221, Section 41.....3

Ohio Rules of Appellate Procedure, Rule 12(A).....3

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FRANK L. JOHNS,
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vs.

THE SUPREME COURT OF OHIO,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Sixth Circuit Court of Appeals

JURISDICTIONAL STATEMENT

Petitioner appeals from the final judgment of the Sixth United States Circuit Court of Appeals dated January 30, 1985, affirming the judgment of the District Court for the Southern District of Ohio granting Respondent's Motion to Dismiss the Complaint and finally disposing of Petitioner's action against the state of Ohio, notwithstanding the numerous specific allegations in the Complaint charging the Respondent Court with denials of basic rights to due process of the law and to the equal protection of the law. Jurisdiction of this Court accordingly arises under Title 28, Section 1254, of the United States Code, and under the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Amendment Fourteen to the Constitution of the United States, as pertinent hereto, provides:

> "No state shall make or enforce any law which shall abridge the privileges or any immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 12(A) of the Ohio Rules of Appellate Procedure, pertinent hereto:

> "The appeal shall be determined on its merits, on the assignments of error set forth in the briefs...all errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error."

Section 41 of Amended Substitute Senate Bill No. 221:

> "Notwithstanding the provisions of Chapter 2743 of the Revised Code, Mr. Frank Johns, 12704 Craven Avenue, Cleveland, Ohio, 44105, is hereby authorized to file a claim for damages in the Court of Claims for lost

wages, legal expenses, and general damages resulting from his alleged unlawful incarceration.

"The Court of Claims, after all the evidence in support of this claim has been heard, shall determine:

(1) whether the preponderance of evidence offered supports a finding that Mr. Johns has been unlawfully incarcerated by the state of Ohio, and if this is so,

(2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any award for damages made to Mr. Johns by the Court of Claims."

OPINIONS OF THE LOWER COURTS

The District Court wrote an Opinion granting a Motion of the Respondent to dismiss the Complaint and declaring that: "Although the named Defendant is the Supreme Court of Ohio, this suit, in reality, is against the state of Ohio. Any relief this court might grant would

compel the Court of Claims to find that Plaintiff was unlawfuly incarcerated by the State of Ohio and award him compensation from the Treasury of the State."

The District Court further declared: "Even if the State were not immune from suit, this court is without jurisdiction to review a judicial decision of the Supreme Court of Ohio;" and "nor does the Complaint state a claim for relief."

The Sixth Circuit Court wrote an Opinion affirming the District Court and declared: "Plainly, his Complaint alleges only dissatisfaction with the Ohio Supreme Court's judicial action upon his claim for damages under Ohio law. He alleges no violation of any specific federal constitutional rights other than in the most conclusory terms; his disagreement stems solely from the manner in which the Ohio courts(sic) construed the Ohio legisla-

ture's limited waiver of sovereign immunity in Section 41 of Substitute Senate Bill 221....The federal courts have consistently construed the extent of a state waiver of immunity to be limited by the express terms of the waiver statute. Thus, the fact that the state has waived immunity from suit in its own courts is not waiver of Eleventh Amendment immunity in the federal courts."

STATEMENT OF THE CASE

This case comes before this Court following a dismissal of the Complaint by the District Court and an affirmance of that dismissal by the Sixth Circuit on January 30, 1985.

To quote from the recent decision in Hishon vs. King and Spalding, 1984, 104 S.Ct. 2229, 2233:

> "At this stage of the litigation, we must accept Petitioner's allegations as true. A court may dismiss a Complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Conley vs. Gibson, 355 U.S. 41, 45-46, 1957."

Accordingly, the facts of this case and the factual allegations of the Complaint are admitted. At the outset, the Defendant Court's rule with reference to issues never previously raised, discussed, briefed, or argued is set forth in paragraph 23 of the Complaint; and the refusal to follow that rule in order to accomplish a wrongful objective constitutes an aggravated denial of both due process and equal protection.

Moreover, the manner in which the Court proceeded was a clear violation of due processas set forth in paragraph 11C, in which it is alleged that: "The Defendant Court undertook to decide this

case and to deprive the Plaintiff of all rights granted to him by the clear and express language of the Ohio General Assembly without affording counsel for the Appellant notice of the purported question in the case upon the basis of which the Court intended to act."

This is the second occasion upon which Petitioner's controversy with the Defendant Court has been brought to the attention of this court. A prior petition for a writ of certiorari docketed in this court as Case No. 81-1111 was denied when taken directly to this court from the decision of the Defendant Court in Petitioner's cause.

It is significant, however, that Petitioner's prior petition was not dismissed for want of a substantial federal question. The instant case originated in the Federal District Court for the

Southern District of Ohio, and proceeded to accumulate a remarkable total of the denials of which Complaint is made.

. . . . . .

The Ohio Court of Appeals had no problem in determining that Petitioner had presented, upon trial, ample evidence to establish that he had been unlawfully imprisioned by the State of Ohio, and proceeded to remand the case for trial solely upon the second issue set forth in the special legislation enacted for the Petitioner by the Ohio General Assembly--namely, a determination of the nature and extent, and proper compensation for, the damages incurred by the Petitioner by reason of such unlawful imprisonment.

The Ohio Court of Appeals, in reviewing the evidence to establish the existence of unlawful imprisonment, found the existence of a direct basis for deter-

mination of this case by the decision of this court in Cuyler vs. Sullivan, 446 U.S. 335, 100 S.Ct. 1708. The Defendant Court, on the other hand, casually dismissed the relevance of Cuyler vs. Sullivan with respect to the issue submitted by the General Assembly to the State Court of Claims and declared in its Opinon: "Cuyler vs. Sullivan...does not give him (Petitioner) a right of civil action against the state government based solely upon the alleged shortcomings of counsel." Of course, no such claim was ever made, and the liability of the state of Ohio was created by special act of the legislature, as the defendant Court well knew.

The Complaint charges that the Defendant Court took violent exception to the language embodied in the legislation adopted by the General Assembly for the benefit of Petitioner. Paragraph 11C of

the Complaint is a clear charge of bias and prejudice, wherein it is alleged that:

> "At oral argument, Appellant's counsel was queried by an Associate Justice concerning counsel's view of the authority of the courts to consider a question which had not been raised, briefed, or argued, to which counsel responded that to do so would constitute the Court an advocate, giving counsel no opportunity to respond, and would inevitably result in the destruction of its objectivity."

Notwithstanding the remand of the case for trial by the Court of Appeals upon the sole issue of damages, the Complaint alleges in paragraph 11D that:

> "Defendant Court deliberately undertook to destroy Plaintiff's cause of action by allegedly upholding the trial court because of purported failure of the Plaintiff to introduce sufficient evidence, notwithstanding the fact that the case had been decided by the trial court purely on a question of law...."

The Court of Appeals made this situation clear as set forth in paragraph 21 of the Complaint:

> "The crucial issue is whether the judgment of the United States Sixth Circuit Court of Appeals granting habeas corpus relief to Plaintiff is res judicata and the issue of whether Johns was unlawfully incarcerated by the state of Ohio. If so, the Court of Claims erred in not finding that the State was liable for damages to Johns pursuant to the special legislation enacted on his behalf.
>
> "The issue of unlawful incarceration was determined against the state of Ohio in the habeas corpus action. Thus, by virtue of the binding effect of the determination of unlawful incarceration in the habeas corpus action, there was proof by a preponderance of the evidence that Appellant was unlawfully incarcerated by the state of Ohio, and the trial court failed to follow the mandate of the Ohio General Assembly in concluding that Appellant has no lawful cause of action."

The Complaint alleges that there was no manner whatsoever in which the Defendant Court could overturn or reverse the above-quoted finding without substantially changing the language of the legislation enacted by the General Assembly. The Complaint alleges that this

is precisely what the Defendant Court proceeded to do; and, in so doing, as set forth in paragraph 19 of the complaint, the Defendant committed still another violation of another of its permanently established principles of law. The Complaint quotes the specific language of the principle declared by the Defendant:

> "In determining the legislative intent of statute, it is the duty of this court to give effect to the words used in a statute, not to delete words used or to insert words not used."
> (emphasis supplied by the Court)

Paragraph 20 of the Complaint quotes from the language of the special legislation:

> "The Court of claims, after all the evidence in support of this claim has been heard, shall determine: (1) whether the preponderance of the evidence offered supports a finding that Mr. Johns has been unlawfully incarcerated by the state of Ohio...."

Bearing in mind the application of res judicata by the Court of Appeals and

reliance by that court upon Cuyler vs. Sullivan, the Complaint alleges that:

> "The foregoing language expresses plainly, clearly, and distinctly the sense of the lawmaking body.
>
> "However, contrary to established law and denying to the Plaintiff the equal protection of the law, the Defendant Court in its Opinion asserted: 'There is no presumption that a released prisoner is entitled to the key to the public treasury. The General Assembly intended to defer to the Court of Claims on the separate question of whether the state of Ohio was responsible for Johns' incarceration in such a way as to warrant any discretionary payment of tax dollars to him.'
>
> "The change made by the Defendant Court in the language from the simple words 'whether Mr. Johns has been unlawfully incarcerated by the state of Ohio' to the language of the court 'whether the state of Ohio was responsible for Johns' incarceration in such a way as to warrant any discretionary payment of tax dollars to him' is a deliberate refusal on the part of that court to follow established law, and constitutes neither an application nor an enforcement of the statute, but the enactment of an entirely new satute in violation of the constitutional rights of the Plaintiff. This is legal malice. It

> is also a denial to the Plaintiff of the equal protection of the law."

To continue with the allegations of the Complaint invokes a recitation of the seven deadly sins which may be committed by any court, and least of all to be expected from a State Supreme Court.

Paragraph 13 of the Complaint calls attention to one of the rules of the Defendant Court regarding the importance of syllabi included with every official report of the court. Paragraph 14 recites the syllabi of the decision and opinion herein the subject of the Complaint. Paragraph 15 alleges:

> "The issues which the Defendant Court purported to decide were not issues in the case and had never been issues in the case at any stage of the numerous proceedings in the trial court, in the Court of Appeals, or in the Supreme Court. Accordingly, the Defendant Court did not in fact, and could not in law, decide such issues.
>
> "The creation and the purported decision of such issues was devised for

> the purpose of avoiding the actual issues of law presented for decision, all of which were discussed and their resolution determined by a single dissenting justice. They were devised for the purpose of depriving the Plaintiff of all the rights and privileges accorded to him by the General Assembly of Ohio and by the decision of the Court of Appeals. This is legal malice."

At this point, it is appropriate to observe that the Defendant Court has on several occasions defined legal malice as the intentional doing of a wrongful act. To decide a case with legal malice is a denial of due process of law. A final step in the disposition of Petitioner's case before the Defendant Court involved not simply a deliberate misstatement of the issues and legal principles involved, but a significant misstatement of the record.

The Ohio Court of Appeals, in remanding Petitioner's case for trial on the issue of damages, pointed out in its Opinion:

> "The trial court failed to follow the mandate of the Ohio General Assembly in concluding that Appellant had no lawful cause of action."

On the other hand, the Defendant Court, in arriving at its clear objective of the final dismissal of Petitioner's case, asserted in its Opinion:

> "The Court of Claims correctly followed the mandate of the Court of Appeals when, upon retrial, it entered a judgment in favor of the State upon the Plaintiff having failed to adduce any evidence on the first issue in the legislative mandate."

The record and the Opinion of the trial court discloses beyond doubt that the Court of Appeals correctly stated the action there taken, and the Defendant Court deliberately did not. This egregious denial of due process is set forth in paragraph 17 of the Complaint, which quotes in full the ultimate determination of the trial court set forth in its Opinion.

The clear determination of the Defendant Court to take issue with the legislative mandate and to put an end to Petitioner's claim against the State in the manner above described is set forth in paragraph 16 of the Complaint:

> "Upon discussing and determining such nonexistent issues, the Defendant Court then proceeded to foreclose any right which would have existed to present evidence upon an issue of fact which no one could know was in the case until it was improperly created by the Defendant Court. The Defendant Court did so in spite of the fact that the Court well knew that the trial court had not decided the case upon the basis of the evidence before it. This is legal malice."

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that, in the present posture of this case, the reasons for granting Petitioner's writ are, we believe, particularly persuasive simply upon a perusal of the allegations

of the Complaint itself. The Sixth Circuit's denial of jurisdiction and dismissal of the complaint on the basis of the Eleventh Amendment to the United States Consitution simply cannot be supported in the light of the fact that this lawsuit is not considered by the Defendant Court itself, and is therefore not considered under the law of the state of Ohio, to be a case against the State.

This is pointed out in a quotation appearing supra page iv from the decision of the Defendant Court in 1949 in the case of American Life and Accident Insurance Company vs. Jones, 152 O.S. 287 at 288. That decision was subsequently followed in the case of State ex rel vs. Department of Transportation, 8 O.A. 3d 44. In the latter case, the Ohio court declared:

> "The Court in American Life noted that if a citizen lacked standing in such a case, the citizen would be

> helpless no matter how unlawful, oppressive, or outrageous the conduct of a state official might be.
>
> "The Court in this regard stated: 'As we have suggested, if the instant action were simply an action for the recovery of money, there would be some plausibility in the argument that it was an action against the State and therefore not permitted; but assuredly an action against a state employee to determine rights, liability, or status is not prohibited because that employee happens to be the head of one of the administrative boards of the state.
>
> 'If it were otherwise, it would mean that one could not mandamus a state officer to perform a clearly mandatory duty, or one could not enjoin him from committing a patent and outrageous, illegal act. A private citizen in such case would be helpless from unlawful, oppressive, and outrageous conduct of a state official.'"

Of all "state officials" to whom the foregoing language must apply, the first and foremost must be the members of the supreme judicial court of the state. Petitioner is not in a situation to point out to this court examples of egregious,

outrageous, and unconstitutionally supportable conduct of other supreme courts.

The decision of this court in this case, however, cannot fail to send a clear message to all the state supreme courts in a situation in which the respondent court has admitted for all purposes the allegations of bias, prejudice, fraud, deceit, and deliberately exceeding its jurisdiction by rewriting in a major way the language of a bill enacted specifically for the benefit of the Petitioner by the legislature. If such charges can be casually dismissed and the Complaint against the Respondent simply put to an end without even the necessity of a response from that court, and without an opportunity for a trial of those charges, the consequences of such a dismissal cannot fail to be felt by every litigant in every supreme court of every state when-

ever it seems desirable to any of such courts to avoid the requirements and the strictures of the Fourteenth Amendment and the requirements of fair trial and a fair hearing on appeal.

This case is not a tirade against the morals or evil intentions of the majority of the justices who participated in the denials of Petitioner's constitutional rights. It is, however, obvious that the court was improperly and wrongfully influenced by its violent disagreement with the Ohio legislature. No stenographic records are taken of legislative committee hearings concerning pending legislation. No such record and no notes were available to the Defendant Court concerning the hearing upon the bill for benefit of Petitioner. All the Defendant Court had was the precise, simple language of the enactment itself.

It is evident that the Defendant Court was so certain of its immunity from any form of correction, notwithstanding its numerous denials of Petitioner's constitutional rights, that it boldly made clear its reasons for so doing:

> "There is no presumption that a released prisoner is entitled to a key to the public treasury."

This strange but deliberately ambiguous language contains a complete explanation for the corkscrew manner in which the Defendant Court arrived at its ultimate and final dismissal of the litigation directed by the Ohio General Assembly to be filed for the benefit of Petitioner.

That the Defendant court has a tendency to similar conduct was demonstrated in a recent case by the same dissenting judge who dissented Petitioner's lawsuit:

> "In arriving at today's decision, the majority ignores fundamental prin-

ciples of constitutional law and the standard of review which courts are obliged to follow in determining constitutional issues.

"It is not within the power of this court to rewrite legislative enactments. A judiciary should not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations. Nevertheless, the majority has done precisely this in substituting its judgment for the General Assembly's." (Pack vs. City of Cleveland, 1982, 1 O.S., 3d, 129)

In Davis vs. Passman, 1979, 99 S.Ct., 2264 at 2277, this court declared:

"As Butz vs. Economou stated only last term: 'Our system of juris prudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law.

'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.'"

In Rogers vs. Alabama, 1904, 192 U.S. 226, 24 S.Ct., 257, this court said:

"It is a necessary and well settled rule that the exercise of jurisdic-

> tion by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

A compelling reason to grant the petition in this case is the fact that the Opinion of the District Court clearly establishes that it is doubtful that this court will ever consider a case in which the foregoing from Rogers more certainly applies. The District Court, in its Opinion, as noted supra, said:

> "Any relief this court might grant would compel the Court of Claims to find that Plaintiff was unlawfully incarcerated by the state of Ohio and award him compensation from the Treasury of the State."

When the District Court made that statement, it of course well knew that the Court of Claims was not a party to this action. The District Court well knew that no order it might issue could be directed to that court. The District Court also well knew the entire history of Peti-

tioner's litigation with the State and the applicable law set forth in the Complaint, all of which was admitted by the Defendant Court.

What the District Court is saying, in plain language, is that if the Defendant Court is required to accord to the Petitioner the rights granted to him of due process of law and equal protection of the law, that simply by granting those constitutional rights and privileges, the Defendant Court could not come to any conclusion other than to affirm the unanimous decision of the Court of Appeals.

The District Court, in other words, is saying clearly that only by denying those rights and privileges did the Defendant Court arrive at its determination and disposition of Petitioner's case. This is precisely what the Petitioner is contending; and both the District Court and the

Sixth Circuit were in error in asserting that they have no authority or jurisdiction to provide a remedy for such denials of constitutional rights.

In Yazoo County Industrial Development Company vs. Suthoff, 1982, 102 S.Ct., 1032, 1033, Mr. Justice Rehnquist stated:

> "...Under the stringent tests enunciated by Bell vs. Hood, 327 U.S. 678, 681-682, 66 S.Ct. 773, 775-76, 'where the Complaint is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit. (emphasis ours) The two exceptions are where the federal question clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or where such a claim is wholly insubstantial and frivolous.'
>
> "So tested, the Complaint sufficiently states federal claims, and without intimating as to the merits of the claims) we reverse the district court's dismissal for lack of jurisdiction."

In the case at bar it is, we believe, clear that "the standards necessary to in-

sure that judicial proceedings are fundamentally fair" were completely absent from the conduct and the decision of the Defendant Court. The charges against it remain undenied. We necessarily emphasize the emphasis employed by this court in Bell vs. Hood that the federal court "must entertain the suit."

This court may assume that the Defendant court well understands the requirements of due process and equal protection on its part in the disposition of cases before it. Reference to the statements and declarations of law from the Defendant Court fully support such an assumption. Unfortunately, the Defendant Court, in many recorded instances, adopts the practice of the historical rabbi who regularly admonished his congregation to "do what I say, but not what I do."

For example, this court made refer-

ence to the responsibility of a court of appeals in attempting to deal with issues never raised, briefed, or argued, and made its fiat in this regard quite clear in the case of C. Miller Chevrolet vs. Willoughby Hills, 1974, 38 O.St. 2d, 298, 301:

> "In fairness to the parties, the court of appeals which contemplates a decision upon an issue not briefed should, as the court of appeals in this case did, give the parties notice of its intention and an opportunity to brief the issue."

This admonition was well known to the court when, during oral argument before it of the Petitioner's case, counsel for the Petitioner was queried by a member of the Defendant Court who had been, as Attorney General of the state, counsel for the state in Petitioner's successful action for a writ of habeas corpus in the Sixth Circuit. Counsel responded that if the court were to undertake what the query indicated, it could no longer act as an

impartial, objective judicial body. No enlightenment was then forthcoming concerning the issue that might be involved. What happened thereafter was a clear negation by the court of "fairness to the parties", as directed by that court in the above quotation.

Previously, the Defendant Court had declared in Slater vs. Motorists Mutual Insurance Company, 1962, 174 O.St. 148:

> "The lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or illwill partaking of the nature of fraud."

The Complaint in the instant case describes at every turn conduct of the Defendant which fits completely the above description of that court concerning "a lack of good faith."

Finally, that the Defendant Court well knew the wrongful nature of its conduct is to be clearly inferred from the following statement of that court's opinion in Jones vs. VIP Development Company, 1984, 15 O.St. 3d, 90:

> "Thus an intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur....We hereby reject the proposition that a specific intent to injure is necessary to a finding of intentional misconduct."

CONCLUSION

It has been said that, like history, justice is a uniquely human notion, so deeply rooted in the consciousness of mankind that its rejection is properly called inhuman.

In Lassiter vs. Department of Social Services, 1981, 101 S.Ct. 2153 at 2163, this court declared:

> "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to insure that judicial proceedings are fundamentally fair."

We respectfully suggest that, without the necessity for further proceedings before this court, the judgments of the District Court and the Sixth Circuit be reversed and this case be remanded for further proceedings according to law.

Respectfully submitted,

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APPENDIX A

FRANK L. JOHNS,
Plaintiff-Appellant,

v.

THE SUPREME COURT OF OHIO
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

No. 83-3358

United States Court of Appeals,

Sixth Circuit

January 30, 1985

Before: ENGEL and KRUPANSKY, Circuit Judges; HILLMAN, District Judge.*

ENGEL, Circuit Judge. The principal issue in this appeal is whether a federal district judge has power, in a suit seeking relief under 42 U.S.C. § 1983, to compel the Supreme Court of Ohio to rehear an

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*Honorable Douglas W. Hillman, Judge, United States District Court for the Western District of Michigan, sitting by designation.

appeal which a majority of its justices had decided adversely to the plaintiff. Plaintiff claims, first in the district court and now before us, that the decision reached by the Ohio courts was not in accord with either federal consitutional law or the law of Ohio, and, further, that its errors "demonstrate [an] absence of impartiality, lack of due process, and a denial of equal protection" leading to an improper result.

The district court dismissed the complaint for failure to state a claim upon which relief can be granted. We affirm.

The history of this litigation begins with the arrest of Frank L. Johns in 1964 for selling marijuana. Following his arrest, Johns was convicted of criminal charges and sentenced to 30 to 60 years of imprisonment. After serving six and one-half years of this term, this court

granted Johns' petition for a writ of habeas corpus. Johns v. Perini, 462 F.2d 1308 (6th Cir.), cert. denied, 409 U.S. 1409 (1972). The petition was granted on the grounds that Johns had been denied effective assistance of counsel. Id. The State of Ohio did not retry Johns.

Johns believed that he had been unlawfully imprisoned and sought to recover damages for his imprisonment from the State of Ohio. The 112th General Assembly of Ohio passed Substitute Senate Bill No. 221, effective November 23, 1977, granting Johns permission to file a claim against the state. Section 41 of that bill provides:

> "Section 41. Notwithstanding the provisions of Chapter 2743 of the Revised Code, Mr. Frank Johns, 12705 Craven Avenue, Cleveland, Ohio 44105, is hereby authorized to file a claim for damages in the Court of Claims for unlawful incarceration and for lost wages, legal expenses, and general damages resulting from his

> alleged unlawful incarceration. The Court of Claims, after all the evidence in support of this claim has been heard, shall determine: (1) whether the preponderance of the evidence offered supports a finding that Mr. Johns had been unlawfully incarcerated by the State of Ohio, and if this is so (2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any award for damages made to Mr. Johns by the Court of Claims. Such claim for damages must be filed prior to July 1, 1979, after which date the authority to file such claim shall expire.

Johns then filed a claim against the state in the Ohio Court of Claims. His action was dismissed twice in the Court of Claims. Both times the Ohio Court of Appeals ordered that the claim be reinstated. Eventually, the Court of Claims denied Johns' claim for relief, and the court's decision was upheld by the Ohio Supreme Court. Johns v. State, 67 Ohio St.2d 325 (1981), cert. denied, 455 U.S. 944 (1982).

Johns then brought suit under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Ohio. In his complaint Johns requested that

> "the judgment of the Supreme Court of Ohio...be vacated and that the Defendant be ordered and directed to rehear the case and to determine the issues before it solely in accordance with established applicable principles of Ohio law, including the statute enacted by the General Assembly of Ohio constituting the basis of the litigation before it and the rights and benefits asserted by the Plaintiff.

Plaintiff's claim in the district court and his appeal to this court must fail. Plainly, his complaint alleges only dissatisfaction with the Ohio Supreme Court's judicial action upon his claim for damages under Ohio law. He alleges no violation of any specific federal constitutional rights other than in the most conclusory terms; his disagreement stems

solely from his unhappiness with the manner in which the Ohio courts construed the Ohio legislature's limited waiver of sovereign immunity in section 41 of Substitute Senate Bill No. 221.

Case law is legion that the Eleventh Amendment to the United States Constitution directly prohibits federal courts from ordering state officials to conform their conduct to state law. See generally Pennhurst v. Halderman, -- U.S. --, 104 S.Ct. 900 (1984), and authorities cited therein. Johns would have us construe his complaint as an action not against the State of Ohio but against the Justices of the Ohio Supreme Court (with the apparent exception of the dissenting justice who agreed with his position respecting his claim for damages). Clearly, however, his action is directed against the state treasury, for he asks for no damages

from the individual justices; indeed, under the doctrine of judicial immunity, he could not recover damages from the judges personally. Simply stated, Johns would use federal mandatory injunctive relief to compel the Ohio Supreme Court to reach a decision which is contrary to that which it has already reached in his case. This he may not do. There is no question but that the state is the real party in interest here. As the Supreme Court observed in Pennhurst:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be'to restrain the Government from acting, or to compel it to act.'" Dugan v. Rank, 372 U.S. 609, 620... (1963).

Pennhurst, 104 S.Ct. at 908 n.11.

It is true that the bill passed by the Ohio legislature acts as a partial

waiver of Ohio's sovereign immunity, but it is equally clear that the consent to suit evidenced in that act was limited to an action in the Ohio Court of Claims. The federal courts have consistently construed the extent of a state's waiver of immunity to be limited by the express terms of the waiver statute. See Florida Dept. of Health v. Florida Nursing Home Assn., 450 U.S. 147, 150 (1981). Thus, the fact that the state has waived immunity from suit in its own courts is not a waiver of Eleventh Amendment immunity in the federal courts. Edelman v. Jordan, 415 U.S. 651, 677 n.19 (1974). The Ohio bill here expressly permitted an action in the Ohio Court of Claims; it nowhere authorized a federal action. In this respect, the issue is identical to that decided by our court in Ohio v. Madeline

Marie Nursing Homes, 694 F.2d 449, 460 (6th Cir. 1982).

Finally, as we mentioned at the outset, it is apparent that Johns' unhapiness lies in his disagreement with the Ohio Supreme Court's final decision denying his suit against the state. His action in the district court can, therefore, only be construed as an effort to seek and obtain in the federal district court a determination of the propriety of the Ohio court's ruling in his state action. This he clearly may not do, for in essence that is an effort to obtain review of a state court decision by a federal district court. A district court is without jurisdiction to review a decision of the Supreme Court of Ohio. This is true even if the plaintiff seeks to raise federal constitutional issues. District of Columbia Court of Appeals v. Feldman, 460 U.S.

462, 482-86 (1983). As United States District Judge Robert Duncan correctly observed in his memorandum opinion below: "Plaintiff's only remedy is review by the United States Supreme Court under 28 U.S.C. [§] 1257; and he has exhausted that remedy."

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

FRANK L. JOHNS,

Plaintiff-Appellant,

v.

SUPREME COURT OF OHIO,

Defendant-Appellee.

No. 83-3358

United States Court of Appeals

Sixth Circuit

Before: ENGEL and KRUPANSKY, Circuit Judges; and HILLMAN, District Judge.

J U D G M E N T

ON APPEAL from the United States District court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District

Court in this case be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefore issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

_____
Clerk

Issued as Mandate: February 22, 1985

APPENDIX C

FRANK L. JOHNS

Plaintiff

v.

THE SUPREME COURT OF OHIO

Defendant

Civil Action C-2-82-1581

United States District Court
For the Southern District of Ohio
Eastern Division

April 18, 1983

OPINION AND ORDER

Plaintiff Frank L. Johns brings this action under 42 U.S.C. §1983 alleging that defendant the Supreme Court of Ohio denied him the equal protection of the laws when it rendered judgment affirming the Ohio Court of claims' decision denying his claim for damages for unlawful incarceration. This matter is before the Court on defendant's motion to dismiss.

In 1965 petitioner, a 40 year old man with no previous criminal conviction, was convicted in the Court of common Pleas for Cuyahoga County for sale of $15 worth of marijuana. He was sentenced to a term of thirty (30) to sixty (60) years imprisonment. The Ohio courts upheld the conviction on appeal. But the United States Court of Appeals for the Sixth Circuit granted plaintiff's federal petition for writ of habeas corpus, holding that he had been denied the effective asistance of counsel because his attorney failed to adequately investigate his alibi defense. Johns v. Perini, 462 F.2d 1308, 1314-1315 (6th Cir. 1972). The writ of habeas corpus issued, and the State of Ohio did not retry plaintiff.

Plaintiff then sought compensation from the State of Ohio for the 6½ years he was incarcerated on the criminal convic-

tion. The Ohio legislature passed a bill giving plaintiff an opportunity to file a claim with the Ohio Court of Claims:

> "Section 41. Notwithstanding the provisions of Chapter 2743 of the Revised Code, Mr. Frank Johns, 12705 Craven Avenue, Cleveland, Ohio 44105, is hereby authorized to file a claim for damages in the Court of Claims for unlawful incarceration and for lost wages, legal expenses and general damages resulting from his alleged unlawful incarceration. The Court of Claims, after all the evidence in support of this claim has been heard, shall determine: 1) whether the preponderance of the evidence offered supports a finding that Mr. Johns has been unlawfully incarcerated by State of Ohio, and if this is so, 2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any award for damages made to Mr. Johns by the Court of Claims. Such claim for damages must be filed prior to July 1, 1979, after which date the authority to file such claim shall expire."

Before the Court of Claims, plaintiff took the position that the United States Court of Appeals for the Sixth Circuit's decision was res judicata on the question of

whether he was unlawfully incarcerated by the State of Ohio, and he offered no additional evidence on the issue. The Court of Claims entered judgment for the State of Ohio "because it had no evidence to review on the first issue in the legislative mandate." Johns v. State, 67 Ohio St. 2d 325, 327 (1981). The Supreme Court of Ohio affirmed the decision of the Court of Claims:

> "The General Assembly, aware of Johns v. Perini, supra, and its conditional nature, limited its grant of access to public treasury to the prior condition that the Court of Claims hear the evidence de novo upon whether justice had been done in Johns' state trial. The argument that Johns v. Perini, supra, is res judicata misses the mark completely. The point is that the decision in Johns v. Perini, supra, does not make the state liable nor does it obligate the General Assembly or limit it in the options it has available to impose as a precondition of its discretionary opening of the public treasury. The General Assembly understands that evidentiary restrictions coupled with the heavy burden of proof upon the state frequently lead to final

> releases from imprisonment irrespective of actual innocence of the accused or objectionable conduct on the part of the government.
>
> "There is no 'presumption' that a released prisoner is entitled to a key to the public treasury. The General Assembly intended to defer to the Court of Claims on the separate question of whether the state of Ohio was responsible for Johns' incarceration in such a way as to warrant any discretionary payment of tax dollars to him. Upon that question no prior judicial decision could be res judicata. That issue could not have been ligated [sic] in Johns v. Perini, supra."

67 Ohio St. 2d at 328-329. Plaintiff's petition for writ of certiori to the United States Supreme Court was denied. Johns v. Ohio, 455 U.S. 944 (1982).

The complaint alleges that this decision of the Supreme Court of Ohio failed to follow procedural requirements mandated by both established Ohio law and by the United States Constitution. In doing, the Defendant Court:

A) Refused to follow and to apply

the principle of res judicata recognized and applied as established Ohio law in numerous cases both prior to and subsequent to the Court's decision in the Plaintiff's case.

B) Refused to follow and to apply the principle governing its procedure enumerated in many cases both prior to and subsequent to the Court's decision in the Plaintiff's case, namely that the Court would refuse even to consider any question of law not raised and not decided in the Court of Appeals, and would refuse to consider or decide any questions of law not raised or brief by either party before it and not designated as an error on the part of any lower court. On the single Associate Justice of the Defendant Court designated hereinbefore as not included in reference to that Court in this cause, undertook to determine the issues which had been raised and to decide them according to established principles of Ohio law.

C) Undertook to decide this case and to deprive the Plaintiff of all rights granted to him by the clear and express language of the Ohio General Assembly without affording counsel for the appellant notice of the purported question in the case upon the basis of which the Court intended to act. Instead, at oral argument, appellant's counsel was queried by an associate justice concerning counsel's view of the authority of the Court to consider a

question which had not been raised, briefed or argued, to which counsel responded that to do so would constitute the Court an advocate, giving counsel no opportunity to respond, and would inevitably result in the destruction of its objectivity.

D) Deliberately undertook to destroy Plaintiff's cause of action by allegedly upholding the trial court because of purported failure of the Plaintiff to introduce sufficient evidence, notwithstanding the fact that the case had been decided by the trial court purely on a question of law wherein that Court had refused to recognize the cause of action granted to the Plaintiff by the General Assembly.

E) Purported to determine the case upon the basis of issues allegedly before it which were not in fact before it, which had never been raised in any court at any time from the commencement of the lawsuit and which were not related to any questions of fact or law ever raised in the case. Such issues were fictitious and were created to avoid discussion of the issues which were discussed and decided solely by the dissenting judge.

F) Refused to follow and to apply the principle required by established Ohio law governing the circumstances under which the language of a statute may be interpreted and construed as opposed to a situation in which a

> clearly unambiguous statute must be applied without the addition of language or words not included in the statute. The foregoing allegations will now be amplified.

The complaint prays that this Court vacate the judgment in Johns v. State, 67 Ohio St. 2d supra and order defendant The Supreme Court of Ohio "to rehear the case and to determine the issues before it solely in accordance with established applicable principles of Ohio law. ..." There is no prayer for money damages.

Defendant moves to dismiss on the grounds that the suit is barred by the Eleventh Amendment, this Court has no jurisdiction to review a decision of the Supreme Court of Ohio, and the complaint fails to state a claim for relief in federal court.

Although the named defendant is the Supreme Court of Ohio, this suit in reality is against the State of Ohio. Any

relief this Court might grant would compel the Court of Claims to find that plaintiff was unlawfully incarcertated by the State of Ohio and award him compensation from the treasury of the State. Such suits are barred by the Eleventh Amendment. Alabama v. Pugh, 438 U.S. 781, 782 (1978); Cory v. White, ____ U.S. ____ (June 14, 1982).

Even if the State were not immune from suit, this Court is without jurisdiction to review a judicial decision of the Supreme Court of Ohio. District of Columbia Court of Appeals v. Feldman, ___ U.S. ___ (March 23, 1983) (slip opinion at pp. 14, 20). Plaintiff's only remedy is review by the United States Supreme Court under 28 U.S.C. §1257; and he has exhausted that remedy. Id.

Nor does the complaint state a claim for relief. Whether or not plaintiff is entitled to compensation for his incar-

ceration in Ohio's penal system is wholly a matter of Ohio law. Plaintiff cannot turn the purely state law questions at issue before the Supreme Court of Ohio into federal claims by characterizing that Court's decision as a denial of the equal protection of the laws. See, Studen v. Beebe, 588 F.2d 560, 566 (6th Cir. 1978). Moreover, the anti-injunction statute, 28 U.S.C. §2283, would preclude this Court from granting plaintiff any relief. Atlantic Coast Line RR. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 285-286 (1970). This Court has no grant of jurisdiction to compel state courts to perform their judicial duties under Ohio law. Haggard v. State of Tennessee, 421 F.2d 1384, 1386 (6th Cir. 1970).

WHEREUPON, the Court HOLDS that defendant's motion to dismiss is meritorious; and, therefore, it is GRANTED. The Clerk of Court shall enter JUDGMENT for defendant. This action is hereby DISMISSED.

Robert M. Duncan, Judge
United States District Court

APPENDIX D

Frank L. Johns

vs.

The Supreme Court of Ohio

Case Number C-2-82-1581

In The United States District Court
For The Southern District of Ohio
Eastern Division

April 18, 1983

JUDGMENT

This action came on for consideration before the Court, The Honorable Robert M. Duncan, United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED THAT: the motion of Defendant to Dismiss is Granted, this action is Dismissed. Judgment is for the defendant.

Dated at Columbus, Ohio, this 18th day of April, 1983.

KENNETH J. MURPHY, CLERK

BY:_____
Deputy Clerk

APPENDIX E

IMPORTANT EXCERPTS FROM PETITIONERS COMPLAINT

Par. 13 Many decades ago the Defendant court announced, and has since followed, a rule to the effect that the issues which that court decides in any case are those issues which are set forth in a syllabus to the court's opinion, which is prepared by the court.

Par. 14 The syllabus of the opinion and decision of the Defendant court in the case in which the State of Ohio appealed to that court is as follows:

"1. A defendant has no common law claim against the State for damages after he has obtained his release upon a writ of habeas corpus for violation of his constitutional rights.

2. Such judgment in habeas corpus is not res judicata upon the issue of whether the State is responsible for the unlawful incarceration in such a way as

> to warrant a discretionary payment to the defendant pursuant to a special statute enacted after his final release."

Par. 15. The issues which the Defendant court purported to decide were not issues in the case and had never been issues in the case at any stage of the numerous proceedings in the trial court, in the Court of Appeals, and in the Supreme Court. Accordingly, the Defendant court did not in fact, and could not in law, decide such issues. The creation and the purported decision of such issues was devised for the purpose of avoiding the actual issues of law presented for decision, all of which were discussed and their resolution determined by a single dissenting Justice. They were devised for the purpose of depriving the Plaintiff of all the

rights and privileges accorded to him by the General Assembly of Ohio and by the decision of the Court of Appeals. This is legal malice.

Par. 16 Upon discussing and determining nonexistent issues, the Defen-dant court then proceeded to fore-close any right which would have existed to present evidence upon an issue of fact which no one could know was in the case until it was improperly created by the Defendant court. The Defendant court did so in spite of the fact that the court well knew that the trial court had not decided the case upon the basis of the evi-dence before it. This is legal malice.

Par. 17 The opinion of the Defendant court in the case of Johns vs. The State of Ohio states:

> "The Court of Claims correctly followed the mandate of the Court of Appeals when, upon retrial, it entered a judgment in favor of the State upon the Plaintiff's having failed to adduce any evidence on the first issue in the legislative mandate. Accordingly, the judgment of the Court of appeals for Franklin County is reversed."

However, the determination and decision of the trial court was as follows:

"Until the legislature enacts statu tes dictating this state to 'make whole' all persons confined wrongfully or improperly in its penal institutions regardless of cause, or as in this case regardless of who commited the wrong other than the State, resulting in the 'unlawful incarceration', this court can only conclude, from the evidence herein, that whatever rights Plaintiff had in habeas corpus did not include that he

be compensated, absent his showing of any legal right of recovery against the State of Ohio. Damnum absque injuria."

Par. 18. The law of Ohio with reference to the right of a court of interpret, as against the duty of a court simply to apply, the language of a statute has been in effect for eighty years and is still in effect. The Defendant court refused to follow and to apply the law in the case filed by the Plaintiff of the equal protection of the law.

Par. 19 That law was pronounced in the case of Slingluff vs. Weaver in 1902, 66 O.S. 621, as follows:

> "The intent of the lawmakers is to be sought first of all in the language employed; and if the words be free from ambiguity and doubt and express plainly, clearly, and distinctly the sense of the lawmaking body,

> there is no occasion to resort to other means of interpretation. That body should be held to mean what it has plainly expressed, and hence no room is left for construction; the office of interpretation is to bring sense out of the words used and not bring a sense into them."

In 1982 in the case of Credit Corporation vs. Vazquez, 69 O.S. 2nd 527 at page 531, the Defendant court stated:

> "In determining legislative intent of a statute, a court must not insert words not used. Wheeling Steel Corporation vs. Porterfield (1970) 24 O.S. 2nd, 24, 28."

In its opinion in the Porterfield case, the Defendant said:

> "In determining the legislative intent of a statute, it is the duty of this court to give effect to the words used in a statute, not to delete words or to insert words not used." (Emphasis supplied by the court.)

Par. 20 The statute enacted by the General Assembly of Ohio for the

benefit of the Plaintiff stated in part:

> "The Court of Claims, after all the evidence in support of his claim has been heard, shall determine:
>
> 1. Whether the preponderance of the evidence offered supports a finding that Mr. Johns has been unlawfully incarcerated by the State of Ohio."

The foregoing language expresses 'plainly, clearly, and distinctly the sense of the lawmaking body.' However, contrary to established law and denying to the Plaintiff the equal protection of the law, the Defendant court in its opinion asserted:

> "There is no 'presumption' that a release prisoner is entitled to a key to the public treasury. The General Assembly intended to defer to the Court of Claims on the separate question of whether the State of Ohio was responsible for Johns' incarceration in such a way as to warrant any discretionary payment of tax dollars to him."

The change made by the Defendant court in the language from the simple words, "whether...Mr. Johns has been unlawfully incarcerated by the State of Ohio" to the language of the court, "whether the State of Ohio was responsible for Johns' incarceration in such a way as to warrant any discretionary payment of tax dollars to him" is a deliberate refusal on the part of that Court to follow established law, and constitutes neither an application nor an enforcement of the statute, but the enactment of an entirely new statute, in violation of the constitutional rights of the Plaintiff. This is legal malice. It is also a denial to the Plaintiff of the equal protection of the law.

Par. 23 The Defendant court has enforced for many decades a longstnading rule

referred to in numerous decisions concerning its determination of issues in any case pending before it. That rule is repeated in the opinion of the Defendant court in the case of Mills-Jennings vs. Dept. (May 26, 1982) 70 O.S. 2nd 95, 99:

> "These issues were not ruled upon by the trial court, nor were they raised or directly ruled upon by the Court of Appeals. It is elementary that questions not raised or passed upon by the lower courts will not be ruled upon by the Supreme Court, in re Adoption of McDermitt (1980) 63 O.S. 2nd 301, 307."

The Defendant court was determined to find an asserted basis for depriving the Plaintiff of the rights accorded to him by statute. Accordingly, the Defendant undertook to resort to a statutory "construction," even though in violation of Ohio law as set forth in Paragraph 23 supra, and without

notice to the litigants of its intention to consider and to decide an issue which had not been raised or passed upon by the lower courts or argued or presented to it by the litigants. The hearings of any appeal in such fashion and without notice of any kind to the litigants and without an opportunity to brief and to argue an issue nowhere in the record of the case before it constitutes a violation of the Plaintiff's due process rights. Such a hearing does not comply with due process requirements either with respect to notice or with respect to fairness. This is also legal malice.

Par. 24 The manner in which the Defendant court considered and determined the Plaintiff's case and the reason for the manner and method of its

action and determination caused the Defendant court to be otherwise than an objective appellant tribunal, completely impartial and disinterested. The obligation of the Defendant court to determine the Plaintiff's case in accordance with established law and to conduct a hearing and to determine the case solely upon the issues presented and argued, and to avoid the consideration of spurious legal questions is required by the following pronouncement of the United States Supreme Court in the case of Marshall vs. Jerrico, Inc. (1980) 100 S. Ct. 1610, 1613.

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns

of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dislogue by affected individual in the decision-making process. See Carey vs. Piphus, 435 U.S. 247, 259-262, 266-267, 98 S. Ct. 1042, 1050-1052, 1053, 1054, 55 L. Ed. 2nd 252 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts of the law. See Mathews vs. Edridge, 424 U.S. 319, 344, 96 S. Ct. 983, 907, 47, L. Ed. 2nd 19 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to popular government, that justice has been done'. Joint Anti-Fascist Committee vs. McGrath, 341 U.S. 123, 162, 71 S. Ct. 624, 643, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. The requirement of neutrality has been jealously guarded by this Court."

Par. 25 The Constitutional right to

which the Plaintiff was entitled, as well as the obligation imposed by the United States Constitution upon the Defendant court, was epitomized by the United States Supreme Court in the case of Schweiker vs. McClure (1982) 102 S. Ct. 1665, 1667:

> "As this Court repeatedly has recognized, due process demands impatiality on the part of those who function in judicial or quasi-judicial capacities."

The totality of the repeated refusals on the part of the Defendant to follow Ohio established law, together with the formulation of spurious issues and the purported decision thereof, together with the refusal of the Court to follow the determination of the United States Supreme Court in Cuyler vs. Sullivan 100 S. Ct. 1708, 446 U.S. 335, to the effect that "if a defendant's retained counsel does

not provide the adequate legal assistance guaranteed by the Sixth Amendment, a serious risk of injustice infects the trial itself" demonstrates the absence of impartiality, the lack of due process, and the denial of equal protection accompanied by legal malice upon the part of the Defendant, evidenced by the following quotation in the opinion of the Defendant court in the Plaintiff's case:

> "There is no 'presumption' that a released prisoner is entitled to a key to the public treasury."

WHEREFORE Plaintiff prays that the judgment of the Supreme Court of Ohio in the case of Frank L. Johns vs. State of Ohio #80-1450a on the docket of the Defendant court be vacated and that the Defendant be ordered and directed to rehear the case

and to determine the issues before it solely in accordance with established applicable principles of Ohio law, including the statute enacted by the General Assembly of Ohio constituting the basis of the litigation before it and the rights and benefits asserted by the Plaintiff.

Office-Supreme Court, U.S.
FILED
JUL 29 1985
ALEXANDER L. STEVAS,
CLERK

CASE NO. 84-1917

In The Supreme Court of the United States

OCTOBER TERM, 1984

FRANK L. JOHNS,

Petitioner,

v.

THE SUPREME COURT OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the Eleventh Amendment to the United States Constitution prohibit the federal judiciary from ordering state officials to conform their behavior to state law?

2. Does the Eleventh Amendment to the United States Constitution prohibit the federal judiciary from exercising its jurisdiction in suits where retroactive damages are sought from a state?

3. Does a United States district court have jurisdiction to review as if on appeal a decision rendered by a state's highest court?

PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court, all parties to this action are listed in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases:

Allen v. McCurry,
449 U.S. 90 (1980) 13

Beck v. Washington,
369 U.S. 541 (1962) 8

Castorr v. Brundage,
674 F.2d 531 (6th Cir. 1982) 13

Clark v. State of Washington,
366 F.2d 678 (9th Cir. 1966) 12

Coogan v. Cincinnati Bar Association,
431 F.2d 1209 (6th Cir. 1970) 13

District of Columbia Court of Appeals v. Feldman,
460 U.S. 462 (1983) 6, 11

Dugan v. Rank,
372 U.S. 609 (1963) 5, 9

Edelman v. Jordan,
415 U.S. 651 (1974) 5, 9, 10

Federated Department Stores v. Moitie,
452 U.S. 394, 398 (1981) 13

Ginter v. State Bar of Nevada,
625 F.2d 829 (9th Cir. 1980) 10

Gryger v. Burke,
334 U.S. 729 (1948) 8

Haggard v. State of Tennessee,
421 F.2d 1384 (6th Cir. 1970) 6, 12

Hortonville Junction School District v. Hortonville Education Association, 426 U.S. 482 (1976) 11

Johns v. State,
67 Ohio St. 2d 325, 423 N.E.2d 863 (1981),
cert. denied, 455 U.S. 944 (1982) 11

Johns v. Supreme Court of Ohio,
753 F.2d 524 (6th Cir. 1985) 7

TABLE OF AUTHORITIES *cont'd*

Page

Lamar v. 118th Judicial District of Texas,
440 F.2d 383 (5th Cir. 1971) 12
Layne & Bowler Corp. v. Western Wells Works, Inc.,
261 U.S. 387 (1923) 7
Migra v. Warren City School District Board of Education, _____U.S._____, 104 S. Ct. 892 (1984) 13
N.A.A.C.P. v. State of California,
511 F. Supp. 1244 (E.D. Cal. 1981) 10
Pennhurst State School & Hospital v. Halderman,
_____U.S._____, 104 S. Ct. 900 (1984) . . .5, 9, 10
Rice v. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70 (1955) 5, 7
St. Louis v. Supreme Court of Nevada,
490 F. Supp. 1174 (D. Nev. 1980) 10
Schad v. Borough of Mt. Ephraim,
452 U.S. 61 (1981) 11
Stump v. Sparkman,
435 U.S. 349 (1978) 10

Statutes:

28 U.S.C. Section 1257. . . . . .6, 11
28 U.S.C. Section 1361. . . . . .6, 12

Other Authorities:

Ohio Substitute Senate Bill No. 221,
112th General Assembly (eff. Nov. 23, 1977) 7, 10
Sup. Ct. R. 17 . . . . . .6, 7

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 753 F.2d 524 (6th Cir. 1985) and is reproduced in the Petition for Certiorari at page A1. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is reproduced in the Petition for Certiorari at page A13.

JURISDICTION

The decision of the United States District Court for the Southern District of Ohio, Eastern Division, noted above, was entered on April 18, 1983. The decision of the United States Court of Appeals for the Sixth Circuit, noted above, was entered on January 30, 1985. Jurisdiction is alleged pursuant to 28 U.S.C. Section 1254(1) and the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

> any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A concise description of the instant case is contained in the Sixth Circuit Court of Appeals' decision:

> The history of this litigation begins with the arrest of Frank L. Johns in 1964 for selling marijuana. Following his arrest, Johns was convicted of criminal charges and sentenced to 30 to 60 years of imprisonment. After serving six and one-half years of this term, this court granted Johns' petition for a writ of habeas corpus. *Johns v. Perini,* 462 F.2d 1308 (6th Cir.), *cert. denied,* 409 U.S. 1049, (1972). The petition was granted on the grounds that Johns had been denied effective assistance of counsel. *Id.* The State of Ohio did not retry Johns.
>
> Johns believed that he had been unlawfully imprisoned and sought to recover damages for his imprisonment from the State of Ohio. The 112th General Assembly of Ohio passed Substitute Senate Bill No. 221, effective November 23, 1977, granting Johns permission to file a claim against the state. Section 41 of that bill provides:

> Section 41. Notwithstanding the provisions of Chapter 2743 of the Revised Code, Mr. Frank Johns, 12705 Craven Avenue, Cleveland, Ohio 44105, is hereby authorized to file a claim for damages in the Court of Claims for unlawful incarceration and for lost wages, legal expenses, and general damages resulting from his alleged unlawful incarceration. The Court of Claims, after all the evidence in support of this claim has been heard, shall determine: (1) whether the preponderance of the evidence offered supports a finding that Mr. Johns had been unlawfully incarcerated by the State of Ohio, and if this is so (2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any awards for damages made to Mr. Johns by the Court of Claims. Such claim for damages must be filed prior to July 1, 1979, after which date the authority to file such claim shall expire.

Johns then filed a claim against the state in the Ohio Court of Claims. His action was dismissed twice in the Court of Claims. Both times the Ohio Court of Appeals ordered that the claim be rein-

stated. Eventually, the Court of Claims denied Johns' claim for relief, and the court's decision was upheld by the Ohio Supreme Court. *Johns v. State,* 67 Ohio St.2d 325, 423 N.E.2d 863 (1981), *cert denied,* 455 U.S. 944 (1982).

Johns then brought suit under 42 U.S.C. Section 1983 in the United States District Court for the Southern District of Ohio. In his complaint Johns requested that

> the judgment of the Supreme Court of Ohio. . .be vacated and that the Defendant be ordered and directed to rehear the case and to determine the issues before it solely in accordance with established applicable principles of Ohio law, including the statute enacted by the General Assembly of Ohio constituting the basis of the litigation before it and the rights and benefits asserted by the Plaintiff.

Johns v. The Supreme Court of Ohio, 753 F.2d 524, 525-26 (6th Cir. 1985).

United States District Judge Robert M. Duncan dismissed Petitioner's suit finding that a federal court lacked jurisdiction to hear the case. *Johns v. The Supreme Court of Ohio,* No. C-2-82-1581 (S.D. Ohio, Apr. 18, 1983). His decision was affirmed by the United

States Court of Appeals for the Sixth Circuit. *Johns,* 753 F.2d at 524. This case is now before this Court on a Petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. Neither the Constitution nor laws of the United States grant Petitioner a right to review on a writ of certiorari. This Court traditionally has demanded a demonstration of the existence of unresolved federal questions of sufficient scope and impact to justify an exercise of its discretionary jurisdiction. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70 (1955).

Petitioner's suit, which seeks nothing more than federal court review of a state court interpretation of state law, is bereft of federal issues. Even if federal issues were present, this action is so unusual and episodic in nature that review by this Court would not result in resolution of important questions of federal law.

2. Petitioner's suit is an expression of his dissatisfaction with Respondent's interpretation of Ohio law. In seeking reversal, Petitioner invites this Court to depart from its prior interpretations of the Eleventh Amendment to the United States Constitution: federal courts may not order state officials to conform their conduct to state law, *Pennhurst State School & Hospital v. Halderman,* _____U.S._____ , 104 S. Ct. 900 (1984); retroactive relief against a state may not be obtained in federal court, *Edelman v. Jordan,* 451 U.S. 651 (1974); and whether or not named, the state is the real party in interest when money from the public treasury will be utilized to satisfy an award of damages, *Dugan v. Rank,* 372 U.S. 609 (1963).

3. Pursuant to 28 U.S.C. Section 1257, only this Court has jurisdiction to review a decision rendered by a state's highest court. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983). As a result, the courts below correctly concluded that the district court had no authority to hear Petitioner's case.

Even in the absence of 28 U.S.C. Section 1257, because Petitioner's cause is tantamount to an action in mandamus, federal law would still prevent any exercise of the district court's jurisdiction in this matter. *See* 28 U.S.C. Section 1361; *Haggard v. State of Tennessee,* 421 F.2d 1384 (6th Cir. 1970).

In any event, Petitioner attempts to relitigate issues he raised, or could have raised, in an earlier case. Therefore, this action is barred by the doctrine of *res judicata.*

ARGUMENT

I

NEITHER THE CONSTITUTION NOR LAWS OF THE UNITED STATES VESTS IN PETITIONER ANY RIGHT TO HAVE HIS SUIT REVIEWED ON WRIT OF CERTIORARI.

Whether to grant review on a writ of certiorari is solely within the discretion of this Court. Sup. Ct. R. 17. Before a writ of certiorari will issue, Petitioner must demonstrate to the satisfaction of this Court that his case presents "special and important reasons" deserving attention. *Id.* These reasons go "beyond the. . .episodic."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). They must involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties," or must arise in the context of a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp. v. Western Wells Works, Inc.*, 261 U.S. 387, 393 (1923) (*quoted in Rice*, 349 U.S. at 619-20), or between state courts of last resort. Sup. Ct. R. 17.

Viewing this test from the perspective of the instant controversy, Petitioner could not find himself on shakier ground. First, the test for issuance of a writ of certiorari presupposes issues of federal concern. In summarizing the posture of this case, the Court of Appeals for the Sixth Circuit noted that Petitioner

> alleges no violation of any specific federal constitutional rights other than in the most conclusory terms; his disagreement [with Respondent] stems from his unhappiness with the manner in which the Ohio courts construed the Ohio legislature's limited waiver of sovereign immunity in section 41 of [Ohio] Substitute Senate Bill No. 221.

Johns v. The Supreme Court of Ohio, 753 F.2d 524, 526 (6th Cir. 1985).

Even assuming, *arguendo*, that a misapplication of state law occurred during Petitioner's protracted journey through the Ohio court system, the Equal Protection Clause of the Fourteenth Amendment does not guarantee

freedom from judicial error. *Beck v. Washington,* 369 U.S. 541, 554-55 (1962). Nor may a federal court substitute its own judgment, on an allegedly erroneous interpretation of state law by a state court, and then treat its determination that error occurred as conclusively demonstrating there was a violation of the Due Process Clause in the state court proceeding. *Gryger v. Burke,* 334 U.S. 729, 731 (1948).

Second, Petitioner's cause of action is as individualistic as any accusation of false imprisonment. His alleged injury results from Respondent's interpretation of one piece of state legislation designed especially for Petitioner and intended to have but a single application. Such circumstances are almost synonomous with "episodic."

Third, Petitioner cannot identify any benefit which will flow to the public as a result of continued litigation in this matter. The idiosyncratic nature of this case will make any decision on the merits rendered by this Court capable of producing few, if any, consequences for future litigants. With the exception of Petitioner's already adjudicated claim, no legal right is at issue.

Finally, Petitioner can hardly argue that *any* juristic conflict will be resolved should his request for review be granted. In short, Petitioner's case satisfies none of the criteria established for distinguishing meritorious from meritless petitions for writs of certiorari.

II

THE GRANTING OF A WRIT OF CERTIORARI IS INAPPROPRIATE WHERE THIS COURT'S PRIOR DECISIONS HAVE DEALT EXTENSIVELY AND CONCLUSIVELY WITH THE ISSUES RAISED BY PETITIONER.

A. THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN* MANDATES REJECTION IN THIS CASE OF THE PETITION FOR REVIEW BY WRIT OF CERTIORARI.

Petitioner seeks to portray his cause as one appropriate for federal intervention. As the Court of Appeals for the Sixth Circuit concluded, however, Petitioner calls on the federal courts to ignore firmly settled constitutional doctrine: the Eleventh Amendment prohibits the federal judiciary from commanding state officials to conduct themselves in conformance with state law "when the relief sought and ordered has an impact directly on the state itself." *Pennhurst State School & Hospital v. Halderman,* _____U.S._____ , 104 S. Ct. 900, 917 (1984). This admonition holds true even when suit is initiated by a citizen of the defendant state. *Edelman v. Jordan,* 415 U.S. 651 (1974).

The state is the real party in interest and the direct target of suit if "the judgment would expend itself on the public treasury. . .or compel [the state] to act." *Pennhurst,* 104 S. Ct. at 908 n.11 (quoting *Dugan v. Rank,* 327 U.S. 609, 620 (1963)). A state's highest

court is an integral part of the state and thereby shielded by the Eleventh Amendment barrier to suit in federal court. *See, e.g., N.A.A.C.P. v. State of California,* 511 F. Supp. 1244, 1257 (E.D. Calif. 1981); *St. Louis v. Supreme Court of Nevada,* 490 F. Supp. 1174, 1180 (D. Nev. 1980); *cf. Ginter v. State Bar of Nevada,* 625 F.2d 829, 830 (9th Cir. 1980).

Here, Petitioner requests this tribunal to contradict the Ohio Supreme Court's interpretation of Ohio law and compel Respondent to award damages for past injuries allegedly suffered by Petitioner at the hands of the State of Ohio. Because Petitioner has not sought, and is barred by judicial immunity from seeking, damages from any judges of the Ohio Supreme Court in their individual capacities, *see Stump v. Sparkman,* 435 U.S. 349 (1978), the only source of recovery must be the state's treasury. This would give rise to a judgment of retroactive relief directly against the state, the exact scenario the Eleventh Amendment was designed to prevent. *Edelman,* 415 U.S. at 664-70.

Of course, sovereign immunity may be waived, *Pennhurst,* 104 S. Ct. at 907; and Ohio Substitute Senate Bill No. 221 did contain a waiver to the extent that Petitioner was permitted to sue in Ohio's Court of Claims. Nevertheless, "a State's waiver of sovereign immunity in its own courts is not a waiver of Eleventh Amendment immunity in the federal courts." *Pennhurst,* 104 S. Ct. at 907 n.9. Unless the State's waiver explicitly includes consent to suit in federal court, the Eleventh Amendment forbids the exercise of federal jurisdiction. *Pennhurst,* 104 S. Ct. at 907. Clearly, none of the language in Substitute Senate Bill No. 221 remotely resembles a surrender of the State of Ohio's Eleventh Amendment immunity.

B. A FEDERAL DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW A DECISION OF THE OHIO SUPREME COURT.

From its inception, Petitioner's suit has been a thinly veiled attempt to attack collaterally in the federal arena the finality of a state court proceeding. Yet, it is well established that the jurisdiction of a federal district court is strictly original; it is without jurisdiction to review, let alone reverse or modify, the judicial determination of a state's highest court.[1] *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482-86 (1983). This applies in spite of allegations that "the state court's action was unconstitutional." *Id.* Review of state court proceedings is reserved to this Court. *Id., see also* 28 U.S.C. Section 1257, and Petitioner has already exhausted his opportunity to present his arguments regarding Respondent's handling of his case. *See Johns v. State,* 67 Ohio St. 2d 325, 423 N.E.2d 863 (1981), *cert. denied,* 455 U.S. 944 (1982). Petitioner's invention of specious federal issues cannot resuscitate long-resolved questions of law. He is not entitled to a *second* federal review of state court action because he is disappointed by this Court's response to his first petition for a writ of certiorari.

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[1] Federal courts are bound to observe interpretations of state law rendered by a state's highest court. *See, e.g., Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 65 (1981); *Hortonville Junction School District v. Hortonville Education Association,* 426 U.S. 482, 488 (1976).

C. A FEDERAL DISTRICT COURT MAY NOT GRANT THE SORT OF RELIEF REQUESTED.

Even if the district court otherwise had jurisdiction over this claim, it would lack authority to grant the requested relief. Petitioner is asking this Court to direct the Supreme Court of Ohio to vacate its final judgment and rehear a case. Such a claim for relief is, in essence, one for a writ of mandamus.

Congress, in 28 U.S.C. Section 1361, has granted district courts jurisdiction over mandamus actions but that grant of jurisdiction is limited to actions against federal officers or employees:

> [t] he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Neither Section 1361 nor any other statute confers jurisdiction on a federal court over such actions against a state court. "In any event, Federal Courts have no authority to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties." *Haggard v. State of Tennessee,* 421 F.2d 1384, 1386 (6th Cir. 1970). *See also Lamar v. 118th Judicial District of Texas,* 440 F.2d 383, 384 (5th Cir. 1971); *Clark v. State of Washington,* 366 F.2d 678, 681 (9th Cir. 1966).

D. THIS ACTION IS BARRED BY THE DOCTRINE OF *RES JUDICATA.*

According to the doctrine of *res judicata,* a litigant is barred from "relitigating issues that were or could have been raised" in an earlier case. *Federated Department Stores v. Moitie,* 452 U.S. 394, 398 (1981); *see also Migra v. Warren City School District Board of Education,* _____U.S._____, 104 S. Ct. 892, 894 (1984). *Res judicata* applies in federal court to bar relitigation of matters adjudicated in state court, and the doctrine is fully applicable even to actions under 42 U.S.C. Section 1983. *Allen v. McCurry,* 449 U.S. 90, 103-04 (1980). Petitioner does not avoid the doctrine by suing, in the second action, the tribunal that rendered the earlier decision. *See, e.g., Coogan v. Cincinnati Bar Association,* 431 F.2d 1209 (6th Cir. 1970); and *Castorr v. Brundage,* 674 F.2d 531 (6th Cir. 1982) (court invoked *res judicata* to dismiss suits against state judges that challenged a state court decision). Petitioner must not be permitted to circumvent the doctrine of *res judicata* under the pretense that this is a new suit predicated on original questions of law or fact. He had ample opportunity in his initial application for a writ of certiorari to raise issues of federal constitutional violations allegedly perpetrated by Respondent. He chose not to present them at that time. As a result, any right to review he may have had, has been exhausted.

CONCLUSION

WHEREFORE, for the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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